

How To Nail Those First-Day Bankruptcy Motions

By **Yun Park**

Law360 (March 27, 2024, 2:36 PM EDT) -- Coming on the heels of a Chapter 11 petition, first-day motions are a critical initial step and the best opportunity for debtors counsel to set the stage for the bankruptcy case. Lawyers who spoke with Law360 said that while they may seem fast and furious, these motions take significant preparation and forethought.



A man carrying boxes of files enters the U.S. Bankruptcy Court in Manhattan. First-day motions are key to a successful Chapter 11 case and require careful planning, experts told Law360. (David Goldman/Getty Images)

The first-day hearing is about "the necessities of the business, as opposed to its goals or projections for growth," said Paul Hammer of Barron & Newburger PC. "Limiting the first-day relief requires careful advance planning, at least weeks, but hopefully months before the petitions are filed."

Here are some tips bankruptcy attorneys shared on how companies can prepare their first steps effectively.

Start With The Minimum

Bankruptcy cases can last days or years, but no matter how long a case takes, it is key to keep things simple to get to the second-day hearing.

Attorneys suggest not going beyond the most common first-day motions — including those seeking to use cash collateral to continue paying employees and critical vendors and for debtor-in-possession financing —

without good reason.

"Don't reinvent the wheel," said David Dean of Cole Schotz PC. "Overreaching and inventing new relief that is not standard first-day relief are common examples [of mistakes]."

Proportionality is also important, according to Amy Vulpio of White and Williams LLP.

"While a large and complex case may warrant a full array of first-day motions, in a smaller case, less may be more, and the client's need for an expedient entry into Chapter 11 may demand a more judicious approach," Vulpio said.

Tell a Story

Bankruptcy is not all about numbers. Providing a big picture of where the debtor stands in the bankruptcy process and its plan to extricate itself can help guide the judge to grant critical orders.

"Bolstering a company's prior history, successes and viability to exit bankruptcy is a good place to start," Dean said. "A court is going to want to ... know how we got to bankruptcy court, but starting with the viability of the company in most cases is a good idea."

"While every case has twists and turns, the court and creditors will look to first-day motions to get a sense of how well the debtor has prepared its exit strategy, as well as to understand what's special about the business that will make the Chapter 11 successful," said Vulpio.

Humanizing the debtor, including describing its people, founding and history, often helps the judge understand its circumstances, according to Seth H. Lieberman of Pryor Cashman LLP.

"Corporate debtors are not nameless, faceless companies, but are enterprises founded and run by people," Lieberman added.

During the first-day hearing for Amazon third-party seller Thrasio Holdings Inc. on March 1 in New Jersey, debtors' counsel Matthew Fagen of Kirkland & Ellis LLP introduced the company's leadership team, explained its business model and turnaround efforts and why a Chapter 11 would set it up for a successful future. The firm's lawyers tag teamed, describing their agenda and key details in a slide presentation.

"That helps me, to lay it out like that," U.S. Bankruptcy Judge Christine M. Gravelle said, thanking the lawyers and adding later that it was obvious "there was a tremendous amount of work done, a lot of people involved."

Bringing the corporate narrative to life helps connect parties involved in the case. "There will always be bottom-line concerns, but the more parties feel connected to the debtor and the process, the more likely they are to support the restructuring efforts," said James Vandermark of White and Williams.

Be prepared to back up your story with evidence. Even though motions are "situation-specific," the best way to ensure that they will be granted quickly is to "make sure they are well-written and well-supported, including having a credible and well-prepared witness available to testify as to the facts recited in the motions," said Jonathan P. Friedland of Much Shelist PC.

Present Consensus

While the judge is the attorneys' primary focus, balancing other interests, including those of the U.S. Trustee's Office and creditors, is essential to move the restructuring process forward.

The bankruptcy code encourages debtors to "meet and confer" with key stakeholders before the first-day hearing, and "avoiding this duty will not gain the debtor any favor or empathy from the court," said Hammer. "The best first-day motions are those that feature agreed upon relief with key stakeholders, such as critical vendors or lenders, presented in the most efficient manner possible."

That makes communication key. "You need a good communications plan so that everyone involved in the case knows exactly what's going to happen and what's anticipated so that people don't get — whether internal or external — unnecessarily nervous," said Michael Sirota of Cole Schotz.

"It will show the court and the general pool of interested parties in the case that the debtor is serious,

organized and looking out for everyone's best interests to the best degree that it can," Hammer said. "When a disagreement is present, the court will be aware of the attempts to resolve the issues efficiently."

Know Your Judge

Knowing in advance how a judge runs their courtroom and earning their trust smooths the process.

"Because bankruptcy proceedings essentially are 'bench trials,' where the presiding judge rules upon everything, it is important to gain the trust and favor of the judge from the get-go," Hammer said.

According to Lieberman, one judge, whom he declined to name, has a habit of asking lawyers whose motions involve sureties to define "surety bonds" in order to test the lawyer's understanding of the substance of what they are presenting. Various judges have different preferences about granting interim versus final relief, especially before the unsecured creditors committee is formed.

Lieberman also once faced a judge who had heard seven hours of live trial testimony before he attended the emergency first-day motion that evening. Noticing the judge's condition, the parties at the hearing tailored their remarks and got through their presentations in an abbreviated fashion. The judge appreciated that the parties recognized his condition and wanted to get straight to the parties' arguments.

"What other matters the judge is dealing with might affect their temperament and approach," said Lieberman.

Be wary of treating every case the same. For instance, asking for relief in one case because the attorney received a similar relief in another before a different judge is unwise.

"Avoid indicating that you are utilizing a 'form' or that the relief you are seeking is 'customary,' as this invites the judge to question your judgment as a practitioner," said Lieberman. "Treat each case as bespoke, and the judge will appreciate that you've put in the time and analysis when considering what relief you are seeking before the court."

--Editing by Jay Jackson Jr.